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ALEXANDER L. STEVAS,
CLERK

No. 82-1879

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

JERRY DEAN ROUSSEAU, *Petitioner*

v.

CRISPUS NIX, COMMANDANT, U.S.D.B.

On Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Tenth Circuit

**REPLY BRIEF TO THE
UNITED STATES BRIEF IN OPPOSITION**

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QUESTION PRESENTED

Whether Petitioner is entitled to habeas corpus relief from his court-martial conviction for unpremeditated murder committed in Morocco on the ground that the American Ambassador, the highest United States authority in that country, prohibited Petitioner's counsel from investigating circumstances which would lead to a complete alibi defense and has shown he has been prejudiced by the Ambassador's action.

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The opinion of the court of appeals (Pet. App. 2a-6a) is unreported. The opinion of the district court (Pet. App. 8a-12a) dismissing the habeas corpus petition is also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 3, 1983. The petition for a writ of certiorari was filed on May 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The statement of facts as set forth in the *Brief for the United States in Opposition* (pp. 1-5) is herewith adopted as a fair presentation of the facts in this case, with the exception of the items discussed in the following Argument.

ARGUMENT

The government's factual statement that the military judge inquired of counsel if they were satisfied that they had received sufficient cooperation from the Naval attorney and the Naval Investigative Service "with regard to the matters requested to be investigated at the *scene of the crime*" (emphasis supplied) is unconscionably disingenuous.

There is not now and never has been a dispute in this case about investigation of the *crime scene*. What is now and always has been at issue is investigation of an alibi defense at a point 350 miles from that scene. The government cannot alter this simple, basic, core issue by cleverly setting out facts relating to a non-issue in the text of its brief and relegating to a footnote the evidence relating to the real issue.

PREJUDICE

Quite aside from the blatant attempt to obfuscate the real issue, the facts are and the record so shows, that Counsel's assent to the military judge's inquiry was given after the plea bargain was approved by the convening authority and just prior to pleading. At that point, nothing had changed from a defense point of view. There was still no evidence available concerning a possible alibi. The officer in Morocco who was supposed to attempt to find the Agadir truck driver who could fix the time of Rousseau's ride in his truck, had not provided answers satisfactory to defense counsel (See Footnote, P. 4, *Brief in Opposition*).

The government incorporates by reference its brief in *Strickland v. Washington*, No. 82-1554, to argue that Petitioner must show prejudice to prevail. Yet in that very document, the government is at great pains to point

out that its proposed prejudice rule results where "[n]o . . . state action is involved when the claim is that the lawyer who was provided was, *through no fault of the state*, ineffective." *Brief for United States in Strickland v. Washington*, No. 82-1554, at 13 (emphasis supplied).

We would also point out that this Court has held in *Herring v. New York*, 422 U.S. 853 (1975) and *Brooks v. Tennessee*, 406 U.S. 605 (1972) that governmental affirmative interference with counsel's freedom of action in conducting (the) defense is a violation of an essential attribute of the assistance of counsel guaranteed by the Sixth Amendment.

In this case the defense attorney was specifically forbidden by the American Ambassador to investigate among Moroccan nationals. There can be no closer association between an official and his government than that which exists between an Ambassador and the United States. Within the nation to which he is appointed the Ambassador *is* the United States. If a specific order directed precisely to defense counsel forbidding investigation did not identify conduct by an officer who is the very *persona* of the United States is not governmental interference, there is no such thing. A clearer case simply cannot exist.

After incorporating into this case an argument which by its own terms does not apply, the government blithely asserts that Petitioner has not pointed to evidence which would have been uncovered or that such evidence probably would have affected the outcome of a trial. *Brief for United States in Opposition* 8. In fact, at his first interview with defense counsel Petitioner described two Moroccan nationals who could confirm his presence in Agadir, 350 miles away from Rabat where the murder occurred, before noon on June 3, 1978. Whether these

people *would* have been found, cannot be known because the Ambassador's no-investigation order forbade defense counsel from seeking them out. Had they been found, and had they confirmed Petitioner's account, that confirmation would have cast substantial doubt on the government's circumstantial case. That evidence would undoubtedly have affected the outcome of the trial, and Petitioner has therefore, shown prejudice.

Finally, with a wry sense of the ironic, the government asserts the Petitioner has not yet "made any effort to substantiate his alibi defense in Morocco." *Brief for the United States in Opposition* 8. The government apparently does not realize that it has had Petitioner in its custody since July 7, 1978 in the United States Disciplinary Barracks, Fort Leavenworth, Kansas, and by the very sentence in this case, caused Petitioner to forfeit all pay and allowances, the wherewithal to pursue an investigation.

Thus, to belabor the obvious, even if Petitioner was free to go to Morocco, he was (and is) without resources to finance his or anyone else's travel. This presupposes he even dared to go to Morocco where he is under interdiction as a suspected criminal who committed murder in that country. Conducting or causing the conduct of an investigation under those circumstances is obviously impossible.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury that he forwarded on October 5th, 1983 by the United States mail, first class and postage prepaid, a copy of this **REPLY BRIEF TO THE UNITED STATES BRIEF IN OPPOSITION** in reference to the case of Jerry Dean Rousseau, Petitioner, v. Colonel Crispus Nix, Commandant, U.S.D.B., to the Solicitor General, Department of Justice, Washington, D.C., 20530.

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